

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENISE ANN GALLOWAY

Claimant

VS.

SOUTHWESTERN BELL TELEPHONE COMPANY

Respondent

Self-Insured

)
)
)
)
)
)
)

Docket No. 176,486

ORDER

Respondent appeals from the Award entered by Administrative Law Judge Nelsonna Potts Barnes on February 5, 1997.

APPEARANCES

Claimant appeared by attorney Andrew E. Busch, of Wichita, Kansas. Respondent appeared by attorney Curtis M. Irby, of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has adopted the stipulations listed in the Award. The Appeals Board has also reviewed and considered the report of Mr. Monty Longacre dated August 21, 1996, submitted by stipulation of the parties. The stipulation is undated but shows a filing date of October 25, 1996.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. Respondent contends that the work disability should take into consideration the task loss opinion expressed in the report of Mr. Monty Longacre and should be reduced.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award should be modified. Work disability awarded shall be reduced from the 86 percent granted by the Administrative Law Judge to 76 percent after taking into consideration the task loss reflected in the report by Mr. Monty Longacre.

Claimant sustained bilateral carpal tunnel syndrome as a result of a repetitive activities in the course of his employment with respondent. Claimant's last day of work was October 2, 1994, and that date has been treated as the date of accident according to the principles stated in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

As indicated, the sole issue is the nature and extent of claimant's disability. The extent of disability is based upon two factors: (1) the percentage difference between the wage the claimant earned before and the wage the claimant earned after injury; and (2) the percentage of loss of ability to perform tasks claimant performed in his or her work in the 15 years preceding the date of accident. These two factors, both expressed as a percentage, are averaged to arrive at work disability. K.S.A. 44-510e.

After the injury, respondent was unable to provide claimant with employment due to restrictions from her injuries. Claimant temporarily attempted several other jobs for other employers but was unable to continue. At the time the case was submitted, claimant was not earning a wage. The Administrative Law Judge found claimant had a 100 percent wage loss and respondent does not dispute that finding.

The dispute relates to the finding that claimant sustained a 72 percent loss of ability to perform tasks. This finding is based upon the task list prepared by Mr. Jerry D. Hardin and the opinion of Peter V. Bieri, M.D., the only physician to testify in this case.

The Administrative Law Judge relied solely upon the opinion of Dr. Bieri based upon the task list prepared by Mr. Hardin. The Administrative Law Judge ruled that the task loss opinions expressed in the report of Mr. Longacre should not be considered because it failed to meet the statutory requirement that a task loss opinion be expressed by a physician. K.S.A. 44-510e(a).

Except for statements made by counsel at the time of oral argument of this case, the Appeals Board might have agreed with the decision by the Administrative Law Judge. The written stipulation simply states that the report by Mr. Monty Longacre will be admitted into evidence without deposition of Mr. Longacre. One might assume that the parties

anticipated the report would later be presented to a physician for his or her review and opinion. However, at the time of oral argument, both counsel stated, in spite of argument in claimant's brief, that it was their intention at the time the stipulation was entered that the task loss opinion of Mr. Longacre be considered without supporting testimony by a physician. On the basis of those statements, the Appeals Board concludes that the stipulation shall conform to the intention of the parties and the opinions of Mr. Longacre should be considered.

Mr. Longacre's report indicates that claimant has a 31 percent loss of ability to perform tasks based upon the restrictions by Drs. Bieri, Lucas and Jones. The Appeals Board concludes that this opinion should be considered along with the opinion by Dr. Bieri based upon the task list prepared by Mr. Hardin, who opined claimant has lost 72 percent of her ability to perform tasks. Giving equal weight to those opinions, the Appeals Board concludes claimant has lost the ability to perform 51.5 percent of the tasks she performed in the relevant 15 year work history. Averaging the task loss and wage loss, the Appeals Board finds claimant sustained a 76 percent work disability.

The Appeals Board notes that Mr. Longacre's report also includes a task loss opinion based upon the report from Sergio Delgado, M.D. Dr. Delgado did not recommend restrictions. The Board has not relied upon this task loss from Dr. Delgado's restrictions because it appears at odds with all other indications in the record that claimant sustained injuries warranting restrictions and resulting in task loss.

AWARD

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Denise Ann Galloway, and against the respondent, Southwestern Bell Telephone Company, self-insured, for an accidental injury which occurred October 2, 1994, and based upon an average weekly wage of \$573 for 4.41 weeks of temporary total disability compensation at the rate of \$319 per week or \$1,406.79.

The weekly rate of payment for permanent partial disability benefits is to be reduced, however, pursuant to K.S.A. 44-501(h) by \$115 per week, the amount claimant is receiving as retirement benefits from respondent. Therefore, claimant is entitled to 315.4 weeks at \$204 per week or \$64,341.60 for a 76% work disability, making a total award of \$65,748.39.

As of February 27, 1998, there would be due and owing to the claimant 4.41 weeks temporary total compensation at \$319 per week in the sum of \$1,406.79 plus 173.30 weeks permanent partial compensation at \$204 per week in the sum of \$35,353.20 for a total due and owing of \$36,759.99 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$28,988.40 shall be paid at \$204 per week for 142.10 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Respondent to be paid direct as follows:

Ireland Court Reporting Transcript of Regular hearing	\$ 250.00
--	-----------

Total	\$ 250.00
--------------	------------------

Braksick Reporting Service Deposition of Peter V. Bieri	\$ 94.25
--	----------

Total	\$ 94.25
--------------	-----------------

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Wichita, KS
Curtis M. Irby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director